

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
. Detroit, Michigan  
. July 17, 2014  
Debtor. . 11:00 a.m.  
.

HEARING RE. (#5155) MOTION TO ALLOW CLAIM(S) /NOTICE  
OF AND MOTION FOR TEMPORARY ALLOWANCE OF CLAIM OF THE  
MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT PURSUANT TO  
RULE 3018(a) OF THE FEDERAL RULES OF BANKRUPTCY  
PROCEDURE FOR PURPOSES OF ACCEPTING OR REJECTING THE  
DEBTOR'S FOURTH AMENDED PLAN OF ADJUSTMENT FILED BY  
CREDITOR COUNTY OF MACOMB, MICHIGAN  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Miller, Canfield, Paddock & Stone, PLC  
By: JEROME R. WATSON  
IRENE B. HATHAWAY  
150 West Jefferson Avenue, Suite 2500  
Detroit, MI 48226  
(313) 963-6420

For Macomb Dechert, LLP  
Interceptor Drain By: ALLAN S. BRILLIANT  
Drainage District: 1095 Avenue of the Americas  
New York, NY 10036  
(212) 698-3600

Kirk, Huth, Lange & Badalamenti, PLC  
Raechel M. Badalamenti  
19500 Hall Road, Suite 100  
Clinton Township, MI 48038  
(586) 412-4900

For Official Dentons, US, LLP  
Committee of By: CLAUDE D. MONTGOMERY  
Retirees: 670 Fifth Avenue  
New York, NY 10020  
(212) 632-8390

Court Recorder: LaShonda Moss  
United States Bankruptcy Court  
211 West Fort Street, 21st Floor  
Detroit, MI 48226-3211  
(313) 234-0068

Transcribed By: Lois Garrett  
1290 West Barnes Road  
Leslie, MI 49251  
(517) 676-5092

Proceedings recorded by electronic sound recording,  
transcript produced by transcription service.

1                   THE CLERK: Case Number 13-53846, City of Detroit,  
2 Michigan.

3                   MR. BRILLIANT: Good morning, your Honor. Allan  
4 Brilliant from Dechert, LLP, and I'm joined at counsel table  
5 by my co-counsel, Raechel Badalamenti and Robert Morris from  
6 Kirk, Huth, Lange & Badalamenti on behalf of Midland  
7 Interceptor Drain Drainage District.

8                   MR. WATSON: Good morning, your Honor. Jerome  
9 Watson appearing on behalf of City of Detroit along with my  
10 partner, Irene Hathaway.

11                  MR. MONTGOMERY: Good morning, your Honor. Claude  
12 Montgomery, Dentons, US, for the Retiree Committee, and I'm  
13 joined today with Mr. Joe Selby. Thank you.

14                  MR. BRILLIANT: Good morning, your Honor.

15                  THE COURT: You may proceed, sir.

16                  MR. BRILLIANT: Thank you, your Honor. Your Honor,  
17 as a preliminary matter, please --

18                  THE COURT: Well, as a preliminary matter, let me  
19 apologize to all of you for not being here at our appointed  
20 time. The earlier argument took much longer than I had  
21 thought it would, and so I apologize to you for that.

22                  MR. BRILLIANT: Thank you, your Honor, but it's not  
23 necessary. As it turned out, there was a big traffic jam on  
24 I-94 this morning, and we would have probably had to ask you  
25 for a little bit of an extension in any event --

1                   THE COURT: Okay.

2                   MR. BRILLIANT: -- but thank you for -- you know,  
3 for your courtesy. As a preliminary matter, your Honor, I  
4 spoke with Mr. Watson, and we've agreed solely for purposes  
5 of this hearing that all of the -- you know, the briefs, the  
6 documents that are attached, the declarations both that have  
7 been filed in connection with the 3018 hearing as well as in  
8 connection with the objection to claim will be admitted into  
9 evidence subject to all the parties being able to argue with  
10 respect to, you know, weight and what view your Honor should  
11 give it, but given the -- you know, the nature of the  
12 hearing, we didn't think that it made sense, you know, to  
13 argue about what's hearsay and various other things.

14                  THE COURT: Okay.

15                  MR. BRILLIANT: Now, your Honor, we dumped a whole  
16 lot of paper on your Honor, and --

17                  THE COURT: Well, let's talk about that. I can  
18 represent to you that I have read your briefs, both those  
19 that were filed earlier this week and the ones that were  
20 filed today and yesterday. I skimmed through the hundreds of  
21 pages of attachments. I can't say that I studied any of them  
22 in any particular detail, so that may help you in your  
23 presentation here --

24                  MR. BRILLIANT: Yes.

25                  THE COURT: -- your presentations here this morning.

1                   MR. BRILLIANT: Yes. Well, what I had thought we  
2 would do, your Honor, there's a whole lot here that is  
3 agreed. I mean there are some -- there are some pretty  
4 significant factual disputes, and we have some disputes  
5 about, you know, some issues as a matter of law. What I  
6 thought might make some sense, your Honor, is to go through  
7 some of the documents, go through the facts, highlight for  
8 your Honor, you know, really what facts are pretty much  
9 agreed, what's really, you know, in dispute here, talk about  
10 some of the legal arguments and obviously, to the extent that  
11 we can, you know, answer any questions or concerns that your  
12 Honor may have having -- hearing the presentation or read the  
13 briefs.

14                  So, your Honor, as your Honor knows, all of this,  
15 you know, relates to, you know, a giant sinkhole that  
16 occurred in 2004 in connection with, you know, an  
17 interceptor, part of the sewage system, you know, that was  
18 then owned by the DW, you know, SD. At that point in time,  
19 your Honor, you know, the city made certain modifications to  
20 existing contracts that it had to pay for the -- you know, to  
21 the repair of the sinkhole, and there was an extraordinary,  
22 you know, procedure that went into effect in connection with  
23 the issuance of those contracts. And, your Honor, do you  
24 have the exhibits?

25                  THE COURT: I can access them here on my computer if

1 you'll just give me one moment. Okay. Is there an  
2 exhibit -- what would it be attached to first?

3 MR. BRILLIANT: The Marrocco affidavit, declaration,  
4 I guess, to be more, you know, precise.

5 THE COURT: Is that attached to your --

6 MR. BRILLIANT: Our brief, attached to our --

7 THE COURT: -- brief, 6016?

8 MR. BRILLIANT: I believe that's correct, your  
9 Honor.

10 THE COURT: Okay.

11 MR. BRILLIANT: I'm not as conversant in the  
12 documents --

13 THE COURT: So what page in the PDF is it,  
14 approximately?

15 MR. BRILLIANT: Well, we're going to get to, you  
16 know, in a few moments 233.

17 THE COURT: Okay.

18 MR. BRILLIANT: So, your Honor, in two thousand, you  
19 know, and four, there was a, you know -- you know, the  
20 sinkhole. Various procedures were put into place. And  
21 unbeknownst to MIDD, you know -- you know, my client, at that  
22 time, there were some improprieties which ultimately led to  
23 criminal convictions and investigations, prosecutions, and  
24 criminal convictions of the mayor, the head of the DWSD and  
25 various other co-conspirators, and the issue, your Honor, is

1 whether or not there were overcharges that -- you know, that  
2 occurred in that process and whether they were  
3 fraudulently -- the lack of, you know, the fact that there  
4 were overcharges was misrepresented, you know, to our  
5 clients, and the fact that -- the fact that there was a  
6 governmental investigation, a U.S. Attorney's investigation,  
7 and whether or not that was disclosed to our client. And  
8 those are the -- when they should have been disclosed to the  
9 client, our clients, and whether or not -- I don't think  
10 anyone disputes that they were not. You know, the city takes  
11 the position that they didn't have, you know, knowledge.  
12 Well, they don't take the position they didn't have knowledge  
13 of an investigation. They take the position that they  
14 weren't required to disclose it, and they didn't know -- have  
15 any knowledge that there were overcharges.

16 On page 233, your Honor, this is the complaint that  
17 was filed by the city in connection with the suit in front of  
18 Judge Cleland where they intervened in connection with an  
19 action that MIDD had brought against the -- you know, the  
20 contractors and the former officials of the city who  
21 perpetuated the fraud. And in connection with that, your  
22 Honor, in paragraph 23 the city says the -- which is the  
23 intervening plaintiff, the intervening plaintiff's claims are  
24 based upon the conduct first unveiled in the Kilpatrick  
25 prosecution. On December 15, 2010, a grand jury returned a

1 first superseding indictment in the Kilpatrick prosecution  
2 naming Kilpatrick, Ferguson, Bernard Kilpatrick, Mercado and  
3 Miller as defendants. The indictment alleged criminal --  
4 RICO conspiracy, bribery, extortion, obstruction of justice  
5 and mail fraud, wire fraud, and money laundering in relation  
6 to a number of projects entered into by DWSD, including the  
7 DWSD project at issue in this case, the repair of the Macomb  
8 Interceptor sewer at 15 Mile Road in Sterling Heights,  
9 Michigan, under Amendments 2 and 3 to the DWSD contract, CS-  
10 1368. And that's really what this is about, your Honor, this  
11 whole issue, is whether or not, you know, there were  
12 overcharges in connection, you know, with CS-1368, you know,  
13 2 and 3. And on page 233 of the PDF -- actually, I'm going  
14 to go to paragraph 79 of their complaint, which is  
15 paragraph --

16 THE COURT: Okay. Hold on one second because I'm  
17 not sure we're coordinated here. I wish I could show it to  
18 you.

19 MR. BRILLIANT: Maybe page 99 may be the PDF. Does  
20 that help, your Honor?

21 THE COURT: Let me go to that page and see what  
22 comes up.

23 MR. WATSON: I can't find it either. Can you tell  
24 me the exhibit number?

25 MR. BRILLIANT: It's Exhibit Number 12 --

1 MR. WATSON: To the Marrocco --

2 MR. BRILLIANT: -- to the Marrocco affidavit.

3 MR. WATSON: Okay.

4 MR. BRILLIANT: Your complaint.

5 THE COURT: Okay. It's --

6 MR. BRILLIANT: I think it might be 99, your Honor.

7 I'm sorry, your Honor. It's 13.

8 MR. WATSON: And what paragraph?

9 MR. BRILLIANT: 79.

10 MR. WATSON: Thank you.

11 MR. BRILLIANT: Do you have a hard copy? I think we  
12 gave you a hard copy.

13 THE COURT: Did we bring that over, Carolyn? I'm  
14 sorry. No. I want to find it in the PDF.

15 MR. BRILLIANT: Okay.

16 MR. WATSON: It's actually Exhibit 15, I think, your  
17 Honor.

18 THE COURT: All right. One more second, please.

19 MR. BRILLIANT: Yes, your Honor. That's right.  
20 It's Exhibit 15.

21 THE COURT: Okay. In the entire 742-page PDF, it is  
22 page 406.

23 MR. BRILLIANT: Unfortunately, the book I have, your  
24 Honor, doesn't have those same numbers, so it's going to be  
25 hard for us --

1           THE COURT: Yeah. The complaint begins on 389.

2           MR. BRILLIANT: Okay. And I wanted to move to  
3 paragraph 79, your Honor --

4           THE COURT: All right. Let me find that.

5           MR. BRILLIANT: -- which is on page 18 of the  
6 complaint.

7           THE COURT: Got it. Okay.

8           MR. BRILLIANT: Okay. So --

9           THE COURT: Now we're good.

10          MR. BRILLIANT: So the city alleged in connection  
11 with its intervening complaint that until the 15 Mile Road  
12 collapse project DWSD maintained a standard practice on its  
13 other sewer and water repair projects of acquiring DWSD  
14 inspectors at sewer repair sites to prepare daily engineering  
15 and inspection reports which detailed, among other things,  
16 the time each employee of each contract or subcontractor  
17 spent on the job each day and the equipment used or stored on  
18 the job site each day. Rather than use the standard daily  
19 engineering inspection reports for the 15 Mile Road collapse  
20 project, Mercado instructed DWSD inspectors to use a daily  
21 press report which did not contain the actual hours worked by  
22 each employee each day or the equipment used on the site each  
23 day. And they go through, your Honor, and talk about, you  
24 know, how -- in their complaint about how, you know, these  
25 changes, you know, led to the potential for improprieties.

1 If you go to paragraph 84, it says by reducing the  
2 involvement of DWSD staff in supervising the contractors'  
3 work by transferring management and supervisory  
4 responsibilities to outside contractors and by reducing or  
5 eliminating portions of DWSD's written record of the  
6 contractors' purported activity, Mercado aided, abetted,  
7 participated in and furthered the pattern of racketeering,  
8 you know, through which defendants conducted the Kilpatrick  
9 enterprise. And then it goes on, your Honor, to, you know --  
10 you know -- you know, and talks in the complaint about how by  
11 taking out these controls it made it possible for work to be,  
12 you know, billed that wasn't actually performed. And then we  
13 go, your Honor, to paragraph 101, which is on page 23 of the  
14 complaint, where the city says without waiver of its claims  
15 and without limitation as to its damages, intervening  
16 plaintiff adopts and incorporates herein plaintiff MIDD's  
17 claim that as a result of inflated invoices submitted on the  
18 15 Mile Road sewer collapse, the cost of the repairs of the  
19 15 Mile sewer collapse was increased by at least \$23 million,  
20 so the city, you know, without waiving its right to say it's  
21 more, says that, you know, they adopt, you know, our view  
22 that was filed against the contractors that there's at least  
23 damages of \$23 million of overcharges in connection with  
24 the -- in connection with the -- you know, the -- you know,  
25 the -- you know, the repair of the sinkhole.

1               Now, your Honor, you know, they -- you know, it's  
2 really hard, you know, for the city to say, you know, that  
3 there -- you know, there wasn't fraud here. There were, you  
4 know, guilty pleas. In the city's complaint they go through  
5 and summarize them. We summarize, you know, the documents,  
6 you know, as well, you know, in our briefs, and I don't think  
7 there's any real dispute here that the perpetrators, you  
8 know, pled guilty to overcharges in connection, you know,  
9 with this particular, you know, project.

10              Now, the city in their briefs over the last three  
11 days, you know, say that they don't concede, you know, that  
12 there were any overcharges and that they, in fact, you know,  
13 deny that there were overcharges, but that's just, you know,  
14 unbelievable. There's no credibility, you know, for that  
15 given the statements they've made, given the criminal  
16 indictments, the guilty pleas, the jury, you know, decisions  
17 with respect to, you know, the convictions that there wasn't  
18 a significant overcharge here, and the fact that the city on  
19 their own goes forward and talks about how the policies of  
20 DWSD were changed that enabled this, you know, to happen  
21 really just reaffirms the fact that there were overcharges  
22 here, so I don't think there's really a big argument here or  
23 issue as to the fact that there were overcharges, you know.  
24 We had, you know, put in the declaration of Mr. Winn, who's  
25 an engineer, who testified, you know, that he estimated how

1 much it would have cost to do this project if it was done  
2 appropriately, and he estimates that the total amount of  
3 overcharges exceeded, you know, \$26 million. And in the  
4 complaint that the city filed, they talk about NTH's  
5 estimate, you know, their expert, who they also, you know --  
6 you know -- you know, say estimated that the project should  
7 have cost, you know, significantly, you know, less than it  
8 was ultimately charged, so I don't think there's much of an  
9 issue here as to damages. The question becomes whether or  
10 not there was, you know, fraud, you know, here.

11 Now, with respect to that issue, your Honor, you  
12 have the declaration of Mr. Marrocco, the public works, you  
13 know, commissioner of Macomb County, who was involved to some  
14 extent in the negotiations here and, in particular, in  
15 connection with, you know -- you know, mediations in front of  
16 Judge Feikens over some of these issues, and he, in his  
17 affidavit -- declaration, makes it very clear that he was  
18 told by Mr. Mercado, you know -- you know, directly in a  
19 meeting after Judge Feikens had told the two of them to go  
20 into a room, you know, by themselves and work things out, and  
21 he expressly remembers and says that Mercado represented to  
22 him that there were -- you know, that these were, you know,  
23 fair and legitimate charges and that there were, you know, no  
24 overcharges or any other issues in connection with the money.  
25 And based upon, you know, that representation and the

1 continued representations of the city and the city's failure  
2 to inform, you know -- you know, MIDD, you know, that there  
3 was a governmental investigation, you know, Macomb went  
4 forward and signed, you know, the settlement agreement, the  
5 letter of intent, and then ultimately, you know, signed  
6 the -- you know, the contract, you know, for the sale. You  
7 know, the -- your Honor, it's -- I don't know how, you know,  
8 we're going to find this document, but I think -- I want to  
9 turn you to the settlement agreement, you know, that was --  
10 actually, let's go first, your Honor, to the letter of  
11 intent, which is Exhibit 2 to the Marrocco affidavit.

12 THE COURT: Again, can you give me a page number?

13 MR. BRILLIANT: Page 6 of the -- page 6 of the  
14 letter of intent. I don't have -- unfortunately, I don't  
15 have the same numbering system that your Honor has.

16 THE COURT: One second, please. Okay. I'm on page  
17 6 of his declaration. Is that where you want me to be?

18 MR. BRILLIANT: Okay. And then, you know, it's  
19 probably about 15 or 20 pages past that, you know. Exhibit 2  
20 to the declaration is the 2009 --

21 THE COURT: Exhibit 2. Okay.

22 MR. BRILLIANT: -- letter of intent.

23 THE COURT: Okay. I'm there. Thank you, sir.

24 MR. BRILLIANT: Okay. And then it's page 6.

25 THE COURT: Okay.

1                   MR. BRILLIANT: Okay. Now, this, your Honor, is the  
2 letter of intent. Now, we'll talk about the settlement  
3 agreement in a minute. This was an attachment to the  
4 settlement agreement, and the settlement agreement was  
5 conditioned upon the closing actually occurring. If the  
6 closing of the sale never occurred, then the releases and  
7 various other things wouldn't have occurred, and we'll go  
8 through that, but attached to that was a letter of intent  
9 that set forth a due diligence period that would occur after  
10 the settlement agreement occurred and set up a due diligence  
11 period prior to the closing of the sale. And on page -- and  
12 on paragraph 9 on page 6, you know, the -- you know, the city  
13 agreed during the diligence period, which is defined in the  
14 document as the period from that date through the closing of  
15 the sale of the interceptor, that it would promptly notify  
16 the transferee of any governmental, regulatory, or third-  
17 party complaints, claims, investigations, you know, or  
18 hearings or communications indicating that the same may be  
19 contemplated. Promptly notify the transferee of any  
20 governmental, regulatory, or third-party complaints, claims,  
21 investigations, or hearings, so they agree that if there any  
22 governmental investigations, they would -- during this period  
23 prior to the closing, they would tell us. And, you know,  
24 your Honor, I'm sure you read from the briefs, and I'm not  
25 going to go through all the testimony, but it's absolutely

1 clear that starting in 2008 the FBI showed up, you know,  
2 at -- you know, at the home of various employees of the DWSD  
3 and started asking questions about issues relating to the  
4 sinkhole, the sinkhole repair, you know, project, the  
5 contracting, you know, and Mr. Ferguson, how he got the job  
6 and whether or not, you know, there were, you know -- you  
7 know, issues, you know, with respect to the cost. And that  
8 started in 2008, and notwithstanding the contractual  
9 obligation to inform MIDD just of the investigation, they  
10 never did so. They did not tell us at all prior to the  
11 closing that there was a -- there was an ongoing, you know,  
12 investigation, you know. Mr. Marrocco, you know, in his  
13 declaration and in Mr. Hupp, who is the lawyer for -- you  
14 know, for MIDD in connection with the transaction, both, you  
15 know, say that they would not have closed if they would have  
16 known about the fact that there was an investigation or the  
17 possibility, you know, of overcharges, you know, here in  
18 connection with the transaction, so, you know -- you know,  
19 based upon the representations that Mr. Mercado made to Mr.  
20 Marrocco and the failure of the city to comply with its  
21 obligation under the diligence agreement to inform the  
22 parties of the fact that there was an investigation, your  
23 Honor, we have a very strong, you know -- you know -- you  
24 know -- you know, claim here, I mean extremely strong claim  
25 here that there was actual fraud in the inducement of the

1 contract for the sale of the property which would lead -- you  
2 know, outside of bankruptcy would have potentially led to,  
3 you know, reformation or recision of the contract or  
4 potentially, you know -- you know, damages once the  
5 bankruptcy -- you know, all claims are, you know, turned  
6 into, you know, cash dollar amounts. And given all of the  
7 representations, you know, the amount of the claim is, you  
8 know -- I think it's very hard to argue that it could be  
9 anything less than \$23 million, although based on all the  
10 documentary evidence, I think a \$26 million, you know, number  
11 at a minimum is the more appropriate, you know, claim here.

12 Now, your Honor, in their papers the -- you know,  
13 the -- you know, the city says, well, there was a settlement  
14 agreement, and the settlement agreement, you know, released  
15 all the claims, and I have two responses to that. One is,  
16 your Honor, if -- you know, in Exhibit 3, the next exhibit,  
17 so if we go up probably about, you know, six pages or so --

18 THE COURT: To look for what, sir?

19 MR. BRILLIANT: In the settlement agreement, you  
20 know, the last page before the signature block in the  
21 settlement agreement, paragraph 9, miscellaneous.

22 THE COURT: Got it.

23 MR. BRILLIANT: If you look at 9(a)(2), your Honor,  
24 it says if the parties fail to reach agreement on the terms  
25 of a definitive agreement regarding the transfer of the

1 interceptor within 180 days from the execution date or, if no  
2 closing occurs, within 360 days of the execution date, each a  
3 triggering date, any party within 30 days at the first  
4 occurring triggering date may declare any provision in the  
5 agreement void and without effect. If any provision of this  
6 agreement is applicable, blah, blah, blah, but the bottom  
7 line is, your Honor, you know, they say, "Oh, well, you  
8 waived all these claims, you know, at the time you signed the  
9 letter, you know, of intent." Now, the reality is it was  
10 fraudulent inducement to enter into the settlement agreement.  
11 They said they would tell us about any investigation. There  
12 was already an investigation that was ongoing that they knew  
13 about and they didn't tell us, but more importantly than  
14 that, it's -- the release wasn't effective because it could  
15 have been terminated by MIDD if there wasn't a closing. And  
16 so the same issue here that we were fraudulently induced into  
17 closing both is fraudulent inducement with respect to the  
18 settlement agreement as well as the other agreement, but the  
19 reality is it was not a final release until the sale occurred  
20 because any party could have -- essentially any party, but to  
21 the extent that MIDD, you know, learned about the  
22 investigation or learned that they were, you know,  
23 potentially going to be, you know -- you know, paying too  
24 much and was in a position to -- you know, to terminate --  
25 you know, terminate the agreement. So, your Honor, I think,

1 you know, those simple, you know -- you know, facts, I  
2 think, establish, you know, the fact that we have a claim.

3 Now, the city takes the position, which is just  
4 clearly wrong as a matter of Michigan law, you know, that --  
5 you know, they take the position that the merger clause  
6 that's contained in the agreement, you know -- you know,  
7 precludes, you know, parties, you know, after a closing of a  
8 transaction, you know, from bringing a claim for fraud in the  
9 inducement of the agreement, and they cite the UAW-GM case.  
10 You know, we cite in both our brief and in the reply briefs,  
11 you know, several, you know, more recent cases. There's  
12 actually three cases that came out in 2013 and so far this  
13 year in 2014 from the appellate court, you know, here in  
14 Michigan, you know, that make it very clear that when there's  
15 a -- when there's fraudulent representations made to induce a  
16 party to contract, whether it be a direct claim or a claim  
17 under Michigan law, you know, for silent, you know,  
18 misrepresentation when you fail to disclose what you're  
19 supposed to disclose, that the merger clause doesn't bar the  
20 claim. And, you know, we cite, you know -- you know, all  
21 three of those cases. The, you know, Retiree Committee says,  
22 well, there's, you know, binding Sixth Circuit authority on  
23 it, and they ask your Honor, you know, to read that case.  
24 When your Honor reads that case, we cite in a footnote to our  
25 reply brief that case supports our position as well. The

1 UAW-GM case, which is cited, you know -- you know, by -- you  
2 know, by the city, you know, is really limited, you know, to  
3 its facts. When your Honor reads the most recent cases out  
4 of Michigan, it makes it very clear, you know, how that case  
5 should be interpreted and how that case is interpreted here  
6 in Michigan, and it just doesn't preclude our claim. If  
7 anything, it -- you know, it supports the fact that we  
8 actually, you know -- you know, have this claim.

9 Your Honor, one other document, you know, I wanted  
10 to show you is attached to our reply brief, which is Exhibit  
11 C to the reply brief that we've --

12 THE COURT: One second, please.

13 MR. BRILLIANT: So it's page 35 of -- it's page 35  
14 of 45 on the docket, your Honor.

15 THE COURT: Okay. That's helpful. I have it, sir.

16 MR. BRILLIANT: All right. And, your Honor, this is  
17 a -- you know, an e-mail, you know, cover sheet from Craig  
18 Hupp, who is, you know, counsel to the -- to MIDD in  
19 connection with the transaction, and he's sending an e-mail  
20 to Bob Walter, you know, who's, you know, at the city, and  
21 then also to Mr. Jacobs at Dykema, and, you know, the city  
22 has put in his affidavit or his declaration. You know, he  
23 was the principal, you know, lawyer with respect to the city.  
24 And in the e-mail Mr. Hupp, you know, asks, you know, the  
25 parties to -- you know, he took minutes or notes, you know,

1 at a due diligence meeting where, you know, the city came in  
2 and talked about, you know, various issues, and as you can  
3 see on the date here is March 19th, 2009, well into the  
4 investigation that the U.S. Attorney's Office had started and  
5 well into the time period when the members of DWSD were being  
6 interviewed in connection with the investigation. And, you  
7 know, he -- you know, he asked them if there were anything  
8 that's in error or incomplete, and, you know, to the best of  
9 our knowledge, there's never been any response. And, your  
10 Honor, the issues here -- you know, if you just go to the --  
11 you know, starting on 29 -- whoops. We were up late working  
12 on the reply brief and apologize for being a little  
13 unorganized this morning.

14 THE COURT: That's okay.

15 MR. BRILLIANT: But starting on 29 --

16 THE COURT: Page 29?

17 MR. BRILLIANT: No. Question 29, page 8, or on the  
18 docket it'll be 43 of 45, I believe.

19 THE COURT: Okay. Let me catch up to you. Hold on.  
20 Okay.

21 MR. BRILLIANT: Okay. And so we're just going to  
22 start here. We're going to talk about -- going to get to the  
23 key one in a little bit, but, you know, basically the way  
24 this works is this was a due diligence checklist they gave to  
25 the city. The city came in, had conversations, so describe

1 any regulatory complaint or notices of violations issued on  
2 Detroit or DWSD in the past five years out of or related to  
3 the operation of the facilities. Jacobs and Walter, the  
4 outside counsel and the person from the city, were the people  
5 who were going to respond, and they responded none just to  
6 give you an example as to how, you know, this -- you know,  
7 this works.

8 Now, if we go down, your Honor, to 32, it says  
9 describe any facts of which DWSD or Detroit is aware which  
10 would give rise to or support a claim against any contractor  
11 or other person arising out of or related to the facilities,  
12 and state whether such claim has -- you know, such claim been  
13 asserted. You know, the word "has" probably belongs there,  
14 but -- so basically asking the city, "Are you aware of any  
15 claim that might exist against a contractor or subcontractor  
16 and whether it's been, you know, asserted yet?" And it's  
17 even broader than that. "Are you aware of any facts that  
18 would give rise to or support a claim?" Right? Jacobs and  
19 Walter will address, and their response was, "DWSD is not  
20 aware of any known, threatened, or pending claims other than  
21 those identified in Item 30, and if you go up to 30, you  
22 know, 30 is, "Describe any civil claims asserted or  
23 threatened in the past five years arising out of the  
24 operation of the facilities," and they say three claims,  
25 claims and suits arising out of the collapse. Presumably

1 that's, you know -- you know, tort claims, you know, arising  
2 out of that, you know, people's homes being sucked into the  
3 sinkhole or whatever may have happened. Collins' business  
4 interruption claims because of construction delays in the  
5 Garfield suit, and that's all they disclose. So, you know,  
6 they -- you know, to -- you know, your Honor, they had an  
7 affirmative obligation to disclose the investigation. They  
8 didn't disclose it. They were asked specifically about  
9 whether there were any claims against any contractors, and  
10 although they were aware that the FBI and the U.S. Attorney's  
11 Office was investigating the contractors in connection with  
12 potential fraud in connection with, you know, this  
13 particular, you know, contract, they didn't disclose that.  
14 And to the extent, your Honor, that they say that this vague,  
15 you know, assertion here, you know, that, you know, claims  
16 arising out of, you know -- you know, the collapse somehow is  
17 a disclosure, you know -- you know, the Michigan courts have  
18 made it absolutely clear that when you disclose information,  
19 you have to disclose it in a way that it's -- you know, that  
20 it's meaningful and people can understand it. You can't, you  
21 know, be -- you know, be sneaky and tricky and, you know,  
22 answer the question, you know, with a half truth, you know,  
23 to lead to, you know, an inappropriate, you know -- you know,  
24 impression.

25                   So, your Honor, you know, based upon, you know, the

1 facts and Michigan -- you know, Michigan law, you know, it's  
2 pretty clear, I think, that we have, you know, a good claim.  
3 The other, you know, issues that they raise that they think  
4 may, you know, bar, you know, the claim is, one, they raise  
5 the issue of res judicata in connection with, you know, Judge  
6 Cleland's decision. It's just completely, you know,  
7 inapplicable, you know, to this particular case. That was a  
8 suit that was brought, you know, by MIDD against the -- you  
9 know, against the contractors. It was not a suit related to  
10 the city, and the city intervened initially, you know, to  
11 support the claims of MIDD, you know, the theory being that  
12 either MIDD would get the benefit of it or it would go to the  
13 city. They did not say in their initial intervention that  
14 they thought we did not have the claim. Ultimately, Judge  
15 Cleland concluded that claims against third parties were not  
16 assigned to us, and we couldn't bring those claims, but the  
17 case did not involve or did he rule upon any issues that are  
18 the subject of the complaint that we have, which is against  
19 the -- you know, against the city, so res judicata just  
20 clearly, you know, doesn't apply in this situation, and issue  
21 preclusion and claim preclusion, you know, don't apply  
22 either.

23 And then, your Honor, the only other, you know,  
24 defense that they have, you know, come up with is a, you  
25 know, defense of governmental immunity, which doesn't apply

1       in the situation, and if you would like to hear about that  
2 now, Ms. Badalamenti can talk about that.

3                  THE COURT: That's fine.

4                  MS. BADALAMENTI: Yes. Thank you, your Honor. The  
5 governmental immunity defense that's been asserted by the  
6 city is premised on one case. It's the Blackmar case. And  
7 they assert that the Blackmar case involves a claim of fraud  
8 and recognizes that governmental immunity bars all fraud  
9 claims. That case does no such thing. In fact, the problem  
10 with the Blackmar case and the northern Michigan case that  
11 they cite -- and I will say as a caveat that the rest of the  
12 cases that are cited in that section have nothing to do with  
13 fraud claims or governmental immunity. But with respect to  
14 those two claims, they do involve a claim of fraud, and they  
15 do involve a claim of fraud against a governmental entity.  
16 And the issue and the reason why those claims are subject to  
17 governmental immunity is because the fraud that is supposedly  
18 perpetrated is something that is specifically contemplated by  
19 statute. In other words, it's not an ultra vires. It's not  
20 a proprietary. It's not a -- there's no exception to  
21 governmental immunity that applies to cover any wrongdoing by  
22 the city, so the findings in those cases are that the  
23 governmental agency is immune because there is no basis for a  
24 fraud claim. There is no holding in Michigan law -- and I've  
25 spent the last two days making sure of this before I came in

1 to your Honor to tell you -- there is absolutely nothing to  
2 suggest that a fraud claim, as a matter of law, is precluded  
3 by governmental immunity. In fact, the suggestion is that a  
4 fraud claim, especially a fraud in the inducement claim, is  
5 to be analyzed by its damages and what the damages are sought  
6 and analyzed that way, and as the Court knows, with respect  
7 to contract claims, there is no governmental immunity ever  
8 for contract claims asserted against governmental agencies,  
9 so with respect to that defense --

10 THE COURT: Isn't there an immunity statute?

11 MS. BADALAMENTI: There is. There's a section --  
12 MCL 691.1407 is an immunity statute. It provides that the  
13 governmental agencies in Michigan are immune from tort claims  
14 and that that tort is what the question is. The tort  
15 analysis is not the title of a tort claim. It's not whether  
16 a tort claim is traditionally viewed as a tort claim. The  
17 question for purposes of governmental immunity is what type  
18 of damages are being sought when -- in the case of fraud,  
19 innocent misrepresentation, fraudulent inducement, those  
20 types of claims are -- the remedy that's being sought is  
21 rescission or reformation of the contract, so for that reason  
22 fraud is -- and we cite a number of cases. Fraud is  
23 considered with respect to governmental entities, and there's  
24 no immunity that applies. In particular, we cite a Michigan  
25 Supreme Court case where the -- a public contract was let,

1 and it was based specifically on a misrepresentation. This  
2 is the Valentini versus City of Adrian case. The public  
3 contract was let, and there was a misrepresentation by the  
4 city to induce the contractor to get to that price. When the  
5 fraud was uncovered, the claim was allowed to proceed, first,  
6 because the governmental agency has no statute. It's not  
7 engaged in a governmental function. When it goes outside of  
8 its statutory authority in order to conceal information,  
9 certainly that is not a governmental function, your Honor,  
10 which would be covered by immunity. And, second, because  
11 the -- what the contractor sought was the payment for actual  
12 services, so the issue with fraud and a claim like fraud is  
13 that there's no immunity because there's no statute. A  
14 governmental agency has to be, one, engaged in a governmental  
15 function. That's the first question. A fraud claim -- there  
16 is no statute or law that allows a governmental agency to  
17 make the decision to conceal information with regard to its  
18 contract processes, so the case -- the Blackmar case that was  
19 cited to you by the city here involves a fraud in the  
20 negotiation of an employment contract. However, what is  
21 found in Blackmar is that there was no misrepresentation,  
22 and, in fact, the contract processes that were followed were  
23 specifically provided for by the emergency act that was the  
24 subject of that case, so there's an emergency manager statute  
25 that's followed to the letter that forms that contract, and

1 they say you can't have a fraud claim in that case. All they  
2 did was follow what the statute told them to do.

3 In this case, you have a city who was entering into  
4 a transaction with Macomb knowing and making a conscious  
5 decision to disclose information and conceal other  
6 information in order to induce to get the purchase price that  
7 it wanted, so there is no governmental immunity in such a  
8 circumstance.

9 Furthermore, the claim here is pled for rescission,  
10 reformation, in addition to damages, and for that reason it  
11 would be a contract claim as opposed to the traditional tort  
12 claim that is barred by governmental immunity.

13 MR. BRILLIANT: Your Honor, there's a few more just  
14 miscellaneous points. Your Honor, in the reply, the -- you  
15 know, which really is contrary to all the deposition  
16 testimony, you know, the city now says that it was the  
17 impression, you know, of Mr. Latimer that the DWSD wasn't  
18 being investigated but instead it was an investigation even  
19 though it was centered on the local economic development. If  
20 your Honor reads the deposition designations that we  
21 attached, I mean it's absolutely clear from the very first  
22 situation where Mr. Shukla, who was the chief engineer at  
23 DWSD, was being -- you know, was interviewed by the FBI, and  
24 it was absolutely clear that -- you know, that DWSD issues  
25 and the sinkhole issue, in particular, were being

1 investigated by the government, and it was not -- it was not  
2 disclosed. And, you know, Mr., you know, Latimer's, you  
3 know, interpretation that somehow, you know, he might have  
4 thought that something else was the center the transaction,  
5 it's just not -- it's just not credible, but it's not really  
6 relevant either, you know. The fact is that knowing that  
7 there was an investigation here of the contracting and  
8 subcontracting, you know, process, you know, would have, you  
9 know, required that it be disclosed given that it was a  
10 material piece of information and they had undertaken in the  
11 letter of intent to disclose such events.

12 You know, next, your Honor, you know, their latest  
13 argument is as well that Mr. Ferguson -- companies they  
14 believe only got \$3 million of the -- you know, of the, you  
15 know, total amount, and that's not relevant either. The  
16 reality is that -- you know, that Inland and D'Agostini and  
17 various other contractors also had inflated, you know -- you  
18 know, charges here in part because they were paying, you  
19 know, kickbacks and they needed to inflate their bills, but  
20 the issue is not what Mr. Ferguson got. The question is what  
21 is the total amount of the overcharges. And based upon both,  
22 you know, their own expert, you know, at the time --  
23 engineering firms' estimate as to what it would cost and  
24 MIDD's expert's estimate as to what it would cost and based  
25 upon the allegations that the city had filed in connection

1 with -- in its intervention complaint, it's clear that the  
2 total amount of the overcharges, you know, is much closer to  
3 \$26 million than to any other number.

4 THE COURT: How do you deal with the challenge that  
5 the city makes to the weight or credibility that should be  
6 given to your expert's conclusion regarding the damages?

7 MR. BRILLIANT: Yes, your Honor. I think the first  
8 thing is, your Honor, the expert has 26 years of experience,  
9 you know, creating estimates. He had the benefit of all of  
10 the information that the city had at the time that it let out  
11 the contracts plus about half of the information as to when  
12 the project -- you know, half the information about what had  
13 happened on the project, you know, through the process, and  
14 he was able to come up with a number based upon his expertise  
15 as to what it would cost. And his number was very consistent  
16 with the numbers of NTH, the city's, you know, expert, you  
17 know, as they disclose in the complaint, and -- you know, and  
18 so I think it's very credible.

19 Also, your Honor, he points out in his declaration,  
20 you know, a number of the really extraordinary, you know,  
21 charges that exist, which kind of gives you a sense of the  
22 magnitude of the -- you know, of the fraud here, the amount  
23 of fees charged, you know, for security, the amount of fees  
24 charged for -- you know, for pumping and various other things  
25 which were, you know, many multiples of what they would

1 ordinarily, you know, cost, so it's -- I think, your Honor,  
2 their -- you know, their argument is, you know, completely,  
3 you know, misplaced as to, you know, the validity of -- you  
4 know, of his analysis. I think it was an appropriately, you  
5 know, done analysis, and I think it's -- you know, the result  
6 of it, you know -- you know, withstands, you know, scrutiny,  
7 you know, here.

8 You know, the last thing with respect to damages,  
9 your Honor, is there -- you know, this was a -- you know,  
10 intended to be a global settlement, which resolves not just  
11 the -- you know, the issues with respect to, you know, the --  
12 you know, the sinkhole, you know, collapse and the repair but  
13 also with respect to certain other things that were, you  
14 know, outstanding in connection with the disputes between the  
15 parties at the time. Now, it's not disputed at all that the  
16 amount of the -- you know, of the repair, you know, was  
17 passed along, you know, pursuant to this contract, you know,  
18 to -- you know, to MIDD. I don't think that -- that's not  
19 disputed, but instead what they dispute is there was a \$17  
20 million credit to the ultimate, you know, total amount of,  
21 you know -- you know, system debt, the amount of investment,  
22 so to speak, that was -- you know, existed in the assets that  
23 were transferred, you know, to MIDD, and the \$17 million --  
24 the evidence is pretty clear, your Honor, when you read  
25 the -- you know, the -- you know, the transcripts that the

1       \$17 million comes from the -- is a deduction related to  
2       things unrelated, you know, to the transfer of the MIDD  
3       assets. It had to do with a dispute over interest rates, a  
4       dispute regarding, you know -- you know, some radio issues  
5       and various other things, so it's completely unrelated to  
6       these issues, so there's no -- there's no double counting  
7       here, you know, in connection with the -- you know, with the  
8       issues.

9                  In connection, your Honor, with, you know, other  
10       issues, you know, they raise issues as to the credibility of  
11       Commissioner Marrocco in connection, you know, with his, you  
12       know, recollection, you know, relating to the representations  
13       made by Mercado. I would point your Honor to the deposition  
14       transcript of Mr. Hupp, who, although not present at the  
15       meeting where, you know, Judge, you know, Feikens asked Mr.  
16       Marrocco and Mr. Mercado to go into the room and, you know,  
17       resolve the issues, but -- you know, but he talks about the  
18       fact that, you know, MIDD was very concerned about, you  
19       know -- you know, whether there were overcharges here, and  
20       that was an issue for them. And then I'd also say that --  
21       your Honor, that if you read the deposition transcript, there  
22       is nothing inconsistent between the declaration and the  
23       deposition transcript or between the deposition transcript at  
24       various times when Mr. Watson asked questions of Mr.  
25       Marrocco. Instead he would ask him a couple questions about

1 conversations that he had about representations. Then he'd  
2 move on to something else before he, you know -- you know,  
3 would tie it all down. Then he would come back to it. He'd  
4 get a little bit more information, and then he would -- came  
5 back to it a third time, you know. You know, the problem  
6 with -- you know, with depositions is -- you know, especially  
7 when you hop around like that is you get whatever information  
8 you ask for, and you don't get anything, you know, more than  
9 that. And when your Honor reads the transcript, it'll be  
10 very clear to your Honor that Mr. Marrocco's testimony didn't  
11 change. It's just that by jumping around and getting half  
12 the story here and half the story there and a little bit  
13 more, you know, at the end, he just got different pieces of  
14 it, but none of it is inconsistent with each other. And the  
15 fact that he didn't get -- you know, Mr. Marrocco never had  
16 the opportunity to say that about -- he says he had this  
17 meeting and this conversation with Mr. Mercado and what the  
18 representation was because that's all that was asked. No,  
19 you know, question as to about, you know, what else, you  
20 know, occurred, you know, around it.

21 So, your Honor, I think at this point I'm going to  
22 sit down and reserve some time for rebuttal, but, you know,  
23 from our perspective, I think we have, you know, established  
24 the likelihood of success, a strong likelihood of success on  
25 our claim and on the -- you know, the dollar amount that we

1 seek to have allowed for voting purposes.

2 THE COURT: Thank you, sir.

3 MR. WATSON: Good morning, your Honor. Jerome  
4 Watson appearing on behalf of the debtor, City of Detroit. I  
5 got involved in this matter about three weeks ago, and my  
6 partner, Mr. LaPlante, at that time told me, "Well, this is  
7 sort of litigation light, this bankruptcy litigation."  
8 Judge, I haven't seen anything light about this over the last  
9 three weeks, and I thank you for reading all the paper we've  
10 submitted.

11 Macomb's claim, we submit, is woefully weak, and I  
12 agree with virtually nothing they said, but I would like to  
13 start off with a timeline because I think that's important  
14 for our arguments. In August 2004 the 15 Mile Road sewer  
15 collapsed. Nine months later, March 2005, the repairs were  
16 completed. In 2005 and 2006, the city allocated the full  
17 cost of those repairs to Macomb. In March 2006, Macomb filed  
18 a petition before Judge Feikens charging that allocation and  
19 also discussing costs that were incurred. In the summer of  
20 2006, the parties started negotiating a potential resolution  
21 of their claims against each other. Late summer, early fall  
22 2006, according to Mr. Hupp, Macomb's attorney, a tentative  
23 settlement was reached between Mercado and Marrocco as to the  
24 cost of the 15 Mile Road repairs.

25 In March 2007, Judge Feikens issued an opinion

1 deciding for Detroit saying Macomb was responsible for all  
2 the repairs, and that scuttled that tentative decision that  
3 Macomb and Detroit reached, so they had to start all over.

4                 In the spring of 2008, Feikens arranged for a  
5 facilitation. Judge Feikens arranged for a facilitation  
6 before Mr. O'Brien, and settlement discussions were commenced  
7 spring 2008 for the resolution of all complaints in the sale  
8 of the Macomb Interceptor system from Detroit to Macomb.

9                 In June -- and this is an important date -- June  
10 2008 Mercado resigns. He's gone by June 2008. According to  
11 Attorney Hupp, Mr. Mercado wasn't a part of the negotiations  
12 that eventually resulted in the sale.

13                 May 2009 the global settlement agreement was entered  
14 into, and that agreement specifically resolved all disputes,  
15 all disputes related to the costs for repairs of the  
16 interceptor system.

17                 A year, four months later, September 2010, the  
18 acquisition agreement was entered into. Under that  
19 agreement, the system is sold to Macomb, and the parties  
20 waived and released all claims regarding the costs of the  
21 sewer collapse and any other projects. The settlement and  
22 the release agreement was separately entered into at that  
23 time. Three months after that, 12-2010, Kilpatrick and  
24 Ferguson were indicted along with others.

25                 First, I want to talk about MIDD's fraud claims.

1 They fail as a factual proposition, number one. MIDD bases  
2 its fraud claims on two contingents. First, according to  
3 MIDD, Mr. Mercado on more than one occasion told Mr. Marrocco  
4 that the 1368 repair costs were fair and accurate. 1368 was  
5 the sewer system -- was the number of the contract for the  
6 sewer system that collapsed, so that's number one.  
7 Representations from Mercado to Marrocco that the repair  
8 costs were fair and accurate, and Marrocco said Mercado told  
9 him this on more than one occasion.

10 Secondly, they say that the city knew that the FBI  
11 and U.S. Attorney were investigating 1368 excessive charges,  
12 and Detroit violated at least the acquisition agreement, and  
13 they say the letter of intent as well, by not apprising  
14 Macomb prior to the September 2010 closing on the acquisition  
15 agreement that this investigation was proceeding forward.

16 There are four witnesses that negotiated the deal in  
17 question. Those witnesses are all experienced attorneys.  
18 For Macomb it was Mr. Misterovich, who was a Macomb employee  
19 but an attorney as well, and Mr. Hupp, a Bodman attorney  
20 who's very experienced. For Detroit the primary negotiators  
21 were Mr. Jacobs, a Dykema attorney, and Mr. Walter, who's now  
22 retired, but a very experienced attorney for Detroit. There  
23 was some assistance given by a rate consultant, Bart Foster,  
24 but those were the key guys in the negotiations. As I  
25 mentioned, Mercado wasn't a part of the negotiations. They

1 really started right about the time he left.

2                 The Detroit witnesses, including the two who  
3 negotiated, all testified very clearly that the  
4 reasonableness of the cost for the repair charges was never  
5 discussed, didn't come up at all. I asked both Mr. Hupp and  
6 Mr. Misterovich about that, and they gave testimony which was  
7 kind of evasive. Neither of them clearly said that the  
8 reasonableness of the charges for the repair costs was  
9 negotiated or discussed during those negotiations. So what  
10 does Macomb base its claim on then? It bases its claim  
11 almost entirely on the alleged statements made by Mercado to  
12 Marrocco. And I examined at some length Mr. Marrocco about  
13 this. In fact, there were three separate times it came up.  
14 Contrary to what Macomb's attorney says, the first two times  
15 I clearly pinned the guy down, clearly pinned him down. It's  
16 right there in the record. He said there was all there was.  
17 The first time he said, "Well, there was a discussion in  
18 2007, and Mercado said that the charges for these repairs was  
19 fair and accurate." And then there were other discussions,  
20 but he couldn't recall the date of those nor could he recall  
21 other details. Well, later on in the deposition I asked him  
22 could he recall some of the other details, and that time he  
23 said, yeah, I can recall two discussions. There were two  
24 discussions. One occurred during 2004 while the repairs were  
25 being made about six weeks after the collapse. And I asked

1 about trucks on the scene, and there seemed to be too much  
2 stuff out there, and were we paying for all that. Marrocco  
3 said, "Oh, no, we're not." And then the next discussion was  
4 the spring of 2005 when I asked about pretty much the same  
5 thing, all this cost we're incurring, and Marrocco said,  
6 "Well, I'm checking everything. This is a fair and accurate  
7 cost that's being charged for this system." I asked him if  
8 there was any other discussions. No, that's all there was.

9           Then at the close of the deposition, I wanted to  
10 confirm that he told me that was all there was, that there  
11 wasn't anything else, and at first he said yes, but then he  
12 came up with two other discussions. He said there was a  
13 discussion in his office where basically Mercado said, "Well,  
14 if there's any problem, we'll give you a credit," and then he  
15 said -- didn't say what the time period was. Then he said  
16 there was a discussion in Mercado's office where about the  
17 same thing was said, so one in his office, one in Mercado's  
18 office, no time frame. So I had three separate versions of  
19 the statements, alleged commitments that Mercado made to  
20 Marrocco. So I'm waiting, Judge, to try to -- thinking,  
21 well, what will he say in his declaration because a  
22 declaration will be filed. The declaration was filed, and  
23 there was yet another story, and I would like to pull out  
24 that declaration. That was Exhibit 1 to Macomb's brief. And  
25 in that declaration, he says something way more specific than

1 anything he ever said in his testimony. He says that he knew  
2 Mercado -- paragraph 12 of his declaration, "I knew Mercado  
3 to be the director of the Detroit Water and Sewerage  
4 Department at the time that the work on the 15 Mile and Hayes  
5 Road repair project occurred and, thus, inquired of him  
6 whether there had been any irregularities on the repair  
7 project to cause the total charges to exceed 52 million."  
8 Paragraph 13, "Mercado responded in the negative and  
9 represented on behalf of the city that the amounts in Exhibit  
10 1 in Schedule 3.8 at Exhibit 3, page 48, were legitimately  
11 incurred and paid," and then he goes on to say, "In reliance  
12 on these representations, we entered into the contract."  
13 We've got a problem with that testimony, Judge. If you look  
14 at Schedule 3.8 at Exhibit 3, page 48 -- and, unfortunately,  
15 I don't think in Macomb's brief they attached all the pages,  
16 so 48 isn't there, so I have to go to our brief and go to --  
17 I believe it's Exhibit 20. No. Exhibit -- maybe it is  
18 Exhibit 20. Exhibit 20 and go to page 48. I go to Exhibit  
19 20, page 48, and I don't know if the Court has it. It says  
20 "Schedule 3.8" at the top.

21 THE COURT: One moment. Oh, this is attached to  
22 your reply brief or your original brief?

23 MR. WATSON: Original brief, Exhibit 20.

24 THE COURT: Do you have a PDF page number for me?

25 MR. WATSON: I really don't.

1           THE COURT: What's the name of the document?

2           MR. WATSON: It's Schedule 3.8. It's one of the --  
3 it's behind -- in Exhibit 20, almost to the end, about three  
4 or four pages, maybe five pages from the end. It's a one-  
5 page document that lists all the charges for the sale of the  
6 system.

7           THE COURT: Hold on. I'm getting there. I have it,  
8 sir.

9           MR. WATSON: Okay. If you look at the top, it says  
10 "Schedule 3.8, Computation of Purchase Price as of June 30,  
11 2010." I think the parties admit that Mr. Foster prepared  
12 this in conjunction with the acquisition agreement. The  
13 point, Judge, is this document is a computation which would  
14 have been made no sooner than June of 2010. Mr. Mercado left  
15 the City of Detroit's employ in June 2008, two years before.  
16 There is no way this document was discussed by Mercado and  
17 Marrocco in 2008, so Marrocco's affidavit is just wrong, to  
18 put it mildly. Though we have four versions of what  
19 happened, one of which -- the most specific version which was  
20 relied on in this courtroom -- that's what they mentioned.  
21 They were relying on the stuff in the affidavit -- is just  
22 dead wrong. We submit that Marrocco's testimony is not  
23 credible and should not form the basis of a fraud claim, and  
24 for that reason alone, their claim should be dismissed.

25           They also claim fraud stating that numerous Detroit

1           witnesses who were interviewed by the FBI or the U.S.  
2           Attorney's Office knew about these excessive costs, and these  
3           excessive costs were being evaluated, these alleged excessive  
4           costs. As a factual matter, all of our witnesses have denied  
5           that when they were interviewed or when they testified before  
6           the grand jury the issue of excessive costs even came up.  
7           Mr. Latimer was the witness who was interviewed the most. He  
8           was interviewed three or four times, testified twice before  
9           the grand jury. He was the head of the DWSD contracts and  
10          grants department. He said that the investigation from what  
11          he could tell entailed was focused on whether there was  
12          favoritism shown by Mr. Ferguson -- to Mr. Ferguson in the  
13          awarding of contracts. And specifically he said he was asked  
14          a lot of questions about the local economic development  
15          department which could give credit to small businesses and  
16          Detroit-based businesses, and that credit was used in  
17          determining who might get contracts. Mr. Shukla did say when  
18          he was interviewed 1368 came up, but there was nothing that  
19          came up about excessive costs. The city's attorney, Mr.  
20          Walter, testified that he couldn't recall 1368 even coming  
21          up, and certainly there was nothing about excessive costs.  
22          Not one of our witnesses could remember anything, any  
23          questions about excessive costs, and most said that 1368 did  
24          not even come up.

25                         The other thing they claim in regard to the fraud

1 claim is that, well, the city knew about an investigation,  
2 and that investigation should have been reported. The city  
3 had to disclose that investigation, and I saw that Mr.  
4 Brilliant in his argument pointed to the letter of intent  
5 that was attached to the May 2009 settlement agreement. I  
6 think we pointed it out in our brief, Judge, that letter of  
7 intent is not even -- the letter of intent clause he cited is  
8 not even applicable.

9 Too many documents here, but Exhibit 19 to our brief  
10 is the settlement agreement, and Exhibit D to Exhibit 19 is  
11 the letter of intent. Mr. Brilliant referred to paragraph 9  
12 of the letter of intent, the obligations under paragraph 9,  
13 and says based on paragraph 9 we had to apprise him of any  
14 claims. However, looking at paragraph 14 of the letter of  
15 intent -- perhaps I could read it in appropriate part.  
16 Paragraph 14 is binding effect. "Except for paragraphs 5 and  
17 10 through 13 hereof, the provisions of which the parties  
18 acknowledge and agree are legally binding upon them, this  
19 letter of intent is not contractual in nature and will not  
20 give rise to any legally binding obligation on the part of  
21 any of the parties hereto." Thus, the paragraph they're  
22 relying on, paragraph 9, isn't binding on the parties, and,  
23 therefore, the claim could not be premised on paragraph 9.  
24 The other problem they've got is that none of the  
25 witnesses who were deposed testified about any information

1 that would necessarily lead to a claim that impacted the  
2 system. Under the acquisition agreement, to the extent the  
3 city had an obligation to report, it only had to report  
4 claims that conceivably could impact the sale of the system.  
5 The investigation, as far as the city was aware, was an  
6 investigation of Mr. Ferguson, being given advantage in  
7 getting contracts. On the 1368 system, Mr. Ferguson didn't  
8 even have a contract with the city. His contract was with  
9 Inland. He was a subcontractor, and just because Ferguson  
10 was a subcontractor on 1368 did not mean that the sale to  
11 Macomb was somehow impacted.

12                 The bottom line, we feel, Judge, is that all of our  
13 witnesses, Latimer, Walter, Shukla, had no idea they say from  
14 the investigation of the FBI and the questions they answered  
15 of excessive charges, nor did they know that there was any  
16 potential claim that could impact the system.

17                 Macomb also says, well, but what about the due  
18 diligence list. There's this due diligence list with a lot  
19 of questions, and Detroit had an obligation to respond to  
20 that. Mr. Jacobs in his testimony talked about that. He  
21 said, "Well, I hadn't seen the list. We think it was  
22 something that was created by Mr. Hupp, Macomb's attorney,  
23 probably as hearsay, but we've agreed that it could be  
24 admitted," but that list, that due diligence list, came up in  
25 Mr. Hupp's deposition. It was made an exhibit to his

1 deposition, Exhibit 7 to his deposition. And in the  
2 deposition actually Macomb questioned him about this due  
3 diligence list and asked him about three questions, 29, 30,  
4 and 32, which Mr. Brilliant, in effect, covered as he was  
5 arguing the matter. And so I followed up with him, and I  
6 asked him did he -- was he aware of any misstatement by  
7 Detroit in answering those three questions when they gave to  
8 him their answers. He admitted that he was not aware of any  
9 of the responses being wrong when they were made by Detroit,  
10 so he's admitted that, as far as he's concerned, he can't say  
11 when Detroit made these representations that any of them were  
12 wrong.

13 Based on that, we submit as a factual matter Macomb  
14 has not proven fraud. A fraud claim has to be proven with  
15 specificity, concrete evidence. There's nothing here even  
16 approaching fraud that they've proven on this record.

17 Next, I want to move to damages. The first point we  
18 would like to -- I would like to discuss is MIDD's reliance  
19 on the Kilpatrick jury verdict in the complaint filed by  
20 Detroit. As far as the jury verdict, they rely on the  
21 indictment allegations which indicate that Detroit overpaid  
22 Ferguson by \$23.7 million. That's what the indictment said.  
23 The jury -- under the jury verdict, Ferguson was found guilty  
24 of extortion, meaning that he got some work improperly,  
25 probably at the expense of other contractors, but the

1 extortion jury verdict doesn't mention anything about the  
2 \$23.7 million, and it doesn't establish that there was a  
3 \$23.7 million overpayment. It doesn't even establish that  
4 Ferguson did not do the work, and it doesn't establish that  
5 Ferguson overcharged or anyone else overcharged for the work  
6 they did.

7 There's also some confusion I would like to  
8 straighten out now about that \$23.7 million and 1368. 1368  
9 was a regular contract at DWSD for \$50 million, a unit price  
10 contract given to Inland. That means for the lining work and  
11 point repair work Inland would do in working on sewers, they  
12 would pay -- be paid a certain amount per unit of work they  
13 did. That contract was for \$50 million. There was an  
14 amendment to that contract for \$10 million, which brought it  
15 up to 60 million. Ferguson was an Inland subcontractor on  
16 that contract. Now, when the collapse occurred -- and that  
17 was an emergency -- the City of Detroit couldn't wait four or  
18 five months to go through the regular process and get another  
19 contract. They had to do it on an emergency basis. Macomb  
20 tries to make a lot out of that, but you couldn't follow the  
21 regular practice to do this. And Judge Feikens had given  
22 Mayor Kilpatrick authority to enter into contracts to do  
23 things on an emergency basis to get the job done. So there  
24 was an emergency contract which was called Amendment 2 to  
25 1368. That was 35 million. Then there was another one,

1 Amendment 3 to 1368, that was 23 million, so 58 million was  
2 the contract amount for the repairs to the Macomb Interceptor  
3 system. There were two other amendments to 1368, 4 was 12  
4 million, 5 was 8 million, so overall 1368 was 138 million, 58  
5 of which was for the emergency sewer repairs. Of that 58  
6 million on the emergency sewer repairs, we've established  
7 through the affidavit of Mr. Latimer that Ferguson was paid a  
8 total of \$3,017,000. The emergency sewer repairs was a --  
9 the ledge is short here, and I can't keep my notes. They  
10 keep slipping off. The emergency sewer repairs was a huge  
11 job. It was an immense project. The sewer was 11 feet in  
12 diameter, and there was no way a guy like Ferguson could  
13 handle most of the costs, so he got the \$3 million. The rest  
14 of his \$20 million was on the other parts of 1368, and  
15 there's just no evidence that Ferguson didn't earn the \$3  
16 million. In fact, the only person who really knows about the  
17 repairs that was on the scene every day was Remesh Shukla,  
18 who ran the operation. He was there 12 hours a day, seven  
19 days a week. He said Inland was not paid for any  
20 subcontractors unless they submitted certified audited signed  
21 invoices, and he said there was absolutely no overcharges.  
22 That was his testimony. We don't think Macomb has  
23 established that there were 23 million of overcharges. They  
24 haven't established there were any.

25 The testimony of Lyle Winn doesn't help them out.

1 What Winn did is he took the initial estimate and got 20,000  
2 pages of documents from Macomb, looked at the estimate and  
3 said, "Well, gee, that 35 or 33 is too high. It should be  
4 28." And so he said the repairs should have been 28. It  
5 cost 54 in total. The difference is 26. That's your  
6 damages. That analysis is flawed. Mr. Shukla testified that  
7 once they got out there, that project was much larger -- a  
8 much bigger project than they thought it was with the initial  
9 estimate by NTH. As I said, NTH was our expert. NTH helped  
10 to work out the initial 33 or \$35 million estimate. The  
11 project was more immense. Shukla testified that they thought  
12 they would have to go down 75 feet. They had to go down 100  
13 feet. There was way more water than they thought of. The  
14 sinkhole kept growing larger and larger, and my favorite,  
15 which didn't come out in our brief at all, was to plug that  
16 sinkhole. You got two 11-foot in diameter ends that broke  
17 sort of in the middle. You got to plug this end. You got to  
18 plug that end because you can't do anything until you stop  
19 that flow, and so first they tried to use a bulkhead. That  
20 didn't work on each end. Then they tried to use sandbags.  
21 That didn't work. So finally -- and this is all in Shukla's  
22 deposition -- they sunk down 2,000 bags of cement on both  
23 sides, 2,000 this side, 2,000 that side. That stopped the  
24 flow, but then that cement hardened. They couldn't dynamite  
25 it out. They had to pick it out, and so that was an immense

1 cost. None of these things were taken into account by Winn.  
2 He admitted he didn't take anything into account. He didn't  
3 even consider the reasons why the costs might have been  
4 greater. We don't think his opinion is worth much of  
5 anything.

6 THE COURT: How do you deal with Macomb's assertion  
7 that in a legal proceeding -- I can't now recall which one,  
8 but in a legal proceeding the city itself did assert  
9 overcharges on this project?

10 MR. WATSON: Probably with a bit of embarrassment,  
11 Judge, but legally we're right. What the rule of law  
12 there -- is there, if you assert something in one case, even  
13 if it's in a pleading -- and this was in our complaint, the  
14 initial pleading -- it can't be used against you in another  
15 case. We cited that in our brief. And the fact of the  
16 matter is after we got into the case and did more analysis of  
17 what was going on, the 23 or \$26 million was too much, and  
18 the 23 came from Inland -- or came from Macomb. We just  
19 incorporated that into our brief, so that doesn't bind us.  
20 And based on the discovery in this case, certainly that 23  
21 million or 26 million is way too much. In fact, our position  
22 is that, if anything, Inland underpaid for the system because  
23 the basic deal was they would pay system debt to purchase it.  
24 That system debt was, in effect, 110 million, not 90 million.  
25 They negotiated down at least 20 million.

1           I'm talking too long. I want to mention the merger  
2 clauses because that's a pretty good legal issue in this  
3 case. It's our position that the merger clauses of the  
4 settlement agreement and the acquisition agreement totally  
5 refute MIDD's claim. This is a case in which the settlement  
6 and then the acquisition agreement were negotiated by four  
7 experienced attorneys. Those were the guys doing the  
8 negotiation, and the agreements reflect exactly what they  
9 decided upon. The merger clause in the settlement agreement  
10 expressly states that it settles any and all claims,  
11 representations. It's a very broad merger clause, and it  
12 also -- the settlement agreement also indicates that it  
13 settles all claims for the costs of repairs. It directly  
14 covers what they're claiming. All claims for the cost of  
15 repairs are expressly covered by the settlement agreement,  
16 and then there's a merger clause saying there's nothing else,  
17 no other agreements, representations, anything, and this is  
18 by four experienced attorneys, Bodman and -- a Bodman  
19 attorney and a Dykema attorney were the two lead attorneys,  
20 and they're trying to get around that. We don't think they  
21 can. What they try to say is, well, fraudulent inducement  
22 can get around it. A fraud can get around it. Well, in this  
23 case, it can't. For both a contract claim and a fraud claim,  
24 you can't use parol evidence to vary the terms of the  
25 agreement. You might be able to use parol evidence for a

1 fact that might impact the agreement or what they're saying,  
2 we wouldn't have entered into it had we known these facts.  
3 In this case, what they're saying, Judge, is that the  
4 agreement they entered into, which was we'll pay all the  
5 system debt less credits we negotiate for the purchase of  
6 this system -- they're trying to make a new agreement. What  
7 they're saying is, okay, we'll pay all system debt plus the  
8 reasonable cost of the repairs for 1368 two and three and  
9 then take into account credits, and that's the deal. That's  
10 not the deal. That's a new deal. The deal was you pay the  
11 debt less credits, and that was it. Even if the Court is  
12 inclined to buy their argument that, well, these are just  
13 some facts which, in effect, defeat the agreement, that  
14 doesn't work in this case because you can't bring in parol  
15 evidence if your reliance on the evidence is not reasonable  
16 and if the evidence directly contrasts the -- or contradicts  
17 the terms of the merger clause in the agreement. Here it was  
18 not justifiable for them to rely on something Mercado  
19 allegedly told Marrocco years before and before the  
20 negotiations even started. Further, it was not reasonable or  
21 justifiable for Macomb to sign a deal in which they're  
22 claiming that, well, we knew Detroit had promised that the  
23 repair costs were reasonable when the deal had an express  
24 provision that says it totally settles any claims in regard  
25 to repair costs. Why would you sign that deal if there's

1 some provision out there or you want a provision or you've  
2 gotten a promise saying you only pay reasonable costs, not  
3 the total costs? It wasn't reasonable, and -- for them to  
4 rely on the Mercado statements, and that defeats the claim,  
5 and plus the agreements totally defeat the claim. Quantum  
6 meruit -- their claims were quantum meruit. When there's a  
7 contract in place, quantum meruit won't lie. There's a  
8 contract in place here.

9                 And, finally, I want to have Ms. Hathaway talk about  
10 the governmental immunity. Their fraud claims fail as a  
11 matter of law because the contract basically covers all the  
12 fraud claims they assert. If you're alleging fraud based on  
13 provisions which are covered by contract, your fraud claims  
14 cannot lie. Thank you, your Honor.

15                 THE COURT: Thank you, sir.

16                 MS. HATHAWAY: Thank you, your Honor. There's  
17 some -- I don't completely understand Ms. Badalamenti's  
18 argument, so I'm afraid I'm going to have to back up a little  
19 bit. There is a Michigan statute that provides that the  
20 governmental entity is immune from tort liability. She  
21 talked a little bit about issues about whether or not this  
22 was a governmental function. I don't really think there's  
23 any question that transferring a government asset to another  
24 government entity is a government function, so the issue  
25 becomes whether -- what are tort claims and what are contract

1 claims, and we've covered this a little bit in our brief, but  
2 it's become a little mucked up, so let me just briefly  
3 indicate a fraud claim involving a contract can only arise if  
4 there is something external to the contract that creates a  
5 duty independent of the contract. They've tried to sort of  
6 say, well, there's fraud, the contract was a fraud, there was  
7 fraud in the inducement, but you have to -- you have to back  
8 up and assess it intellectually. There's a contract, and  
9 there's an issue of whether the contract was breached. There  
10 are claims extrinsic to the contract, fraud, fraud in the  
11 inducement, innocent misrepresentation. Those are all torts,  
12 and they are extrinsic to the contract. We've cited an awful  
13 lot of cases in our brief on point, you know. The big case  
14 in Michigan is the Fultz versus Commercial Union, I think it  
15 is, case, but -- so we have -- clearly all of the fraud parts  
16 are tort, and they're barred by governmental immunity.

17 THE COURT: So your position is a city can commit  
18 fraud and not have to pay damages for it?

19 MS. HATHAWAY: They can commit fraud and they cannot  
20 be sued in tort for it. You know, it may be unfair. There's  
21 case law directly on point.

22 THE COURT: What else is there?

23 MS. HATHAWAY: Contract. They can still bring a  
24 contract claim against the city claiming a breach of  
25 contract, but you cannot -- if, in fact, the contract was

1 breached, you can seek damages. Now, the case that they  
2 relied on in their reply brief, this Valentini case, is a  
3 contract case, and, in fact, I think that Ms. Badalamenti  
4 even admitted --

5 THE COURT: What do you mean when you say "it's a  
6 contract case"?

7 MS. HATHAWAY: The case they cite, Valentini, is a  
8 case brought in contract claiming that they are entitled to  
9 more money under the contract because of a misunderstanding  
10 or a misrepresentation of the amount that was due, and in  
11 that case it was based on the terms of the contract. If you  
12 look at Valentini, there is no discussion of governmental  
13 immunity in the case. It is a case purely talking about the  
14 terms of the contract. I looked, your Honor, and I couldn't  
15 find any cases where a fraud claim had been allowed against  
16 any government entity outside of a contract because it is  
17 barred by governmental immunity. It may not seem fair, but  
18 that's what governmental immunity is. And we actually cited  
19 cases in our brief that say fraud is still a governmental  
20 immunity case, so that brings it down to what are their  
21 contract claims. And in our brief, I went through what the  
22 contract claims were in some detail, and --

23 THE COURT: Well, but pause there. Claimant argues  
24 that although it's a fraud claim nominally, the damages are  
25 contract damages because the way they're calculated is what

1 was paid versus what should have been paid under the  
2 contract.

3 MS. HATHAWAY: And damages is not -- under a  
4 contract, you can only get economic loss. That is true. But  
5 the issue about whether or not it's within the contract or  
6 without the contract, outside of the contract to which  
7 governmental immunity applied would be duty. It's not  
8 damages. It's duty. And if you look at the Fultz case or  
9 Hart or Rinaldo, the threshold inquiry is whether plaintiff's  
10 allegations of a violation of a legal duty, separate and  
11 distinct from the contract obligation. They allege there is  
12 a -- there is an obligation outside of the contract not to  
13 commit fraud. Outside the contract it's a tort. If it's  
14 inside the contract, it's not barred by governmental  
15 immunity. So their contract claims aren't barred by  
16 governmental immunity, but their allegations of fraud, fraud  
17 in the inducement, all of those things are barred by  
18 governmental immunity because they are extrinsic to the  
19 contract and set up by a duty outside of the contract, and  
20 it's a duty issue, not a damages issue. It is true in  
21 contract you can only get your economic loss, whereas in tort  
22 theoretically you can get other things, but that's not what  
23 sets it in and out of the contract. It's the duty, and the  
24 duty --

25 THE COURT: Well, in this case, didn't the city

1 represent in a contract context that there were no such  
2 investigations, as the claimant asserts, which gave rise to  
3 its claim?

4 MS. HATHAWAY: No. What they cite is the letter of  
5 intent that was signed long ago -- well, actually, to tell  
6 you the truth, your Honor, we've never found a signed copy.  
7 I don't think anybody has found a signed copy. The letter of  
8 intent has that statement in it, but, as Mr. Watson  
9 indicated, the letter of intent itself says that these are  
10 not binding provisions, so it's -- the letter of intent is --

11 THE COURT: Well, what's the point if it's not  
12 binding?

13 MS. HATHAWAY: Because it was intent that was later  
14 put into a settlement agreement and later put into an  
15 acquisition agreement. The letter of intent here, an  
16 unsigned letter of intent that contains a provision that says  
17 it doesn't survive after the expiration of the letter of  
18 intent can't be used to void or increase what's in the  
19 settlement agreement and what is in the acquisition  
20 agreement, both of which contain specific statements that  
21 there are no other integration clauses and statements that  
22 there are no other statements outside of it and, you know,  
23 the settlement agreement relating the rates which was all,  
24 you know -- specifically says -- and this was entered into  
25 after all of that -- Detroit and Macomb waive and release any

1 claims with regard to the following matters: the cost of all  
2 projects and contracts shown on 3.8 to the MIDD agreement --  
3 that's what we're talking about here -- and the calculation  
4 of all credits, charges, and adjustments set forth in that  
5 schedule.

6 THE COURT: And your contention is that waives a  
7 concealed fraud claim?

8 MS. HATHAWAY: Concealed fraud claim is a -- a  
9 concealed fraud claim is a tort, but, yes, there was nothing  
10 in the settlement agreement. There was nothing in the  
11 acquisition agreement that said that there were no  
12 investigations. And remember the --

13 THE COURT: That's a different question. Your  
14 argument is that what you just read me waives a concealed  
15 fraud claim.

16 MS. HATHAWAY: It waives all claims.

17 THE COURT: So the answer to my question is yes?

18 MS. HATHAWAY: Yes. There were two other releases,  
19 and --

20 THE COURT: All right. I can give you one more  
21 minute.

22 MS. HATHAWAY: No. I'm essentially done.

23 THE COURT: Oh, all right.

24 MS. HATHAWAY: There were two other releases as  
25 well. Mr. Watson may have something to add.

1                   MR. MONTGOMERY: I believe that I would have  
2 something, yes.

3                   MR. WATSON: Yeah, yeah.

4                   THE COURT: Time is up.

5                   MR. MONTGOMERY: Forty-five minutes up, your Honor?

6                   THE COURT: It is. In fact, Mr. Montgomery, I have  
7 to ask you why you're here at all.

8                   MR. MONTGOMERY: Oh, yes, your Honor, of course.

9                   THE COURT: I can't help but feel some distress that  
10 the city is paying for two sets of lawyers to defend this  
11 claim or --

12                  MR. MONTGOMERY: Well, your Honor --

13                  THE COURT: -- defend this objection to claim.

14                  MR. MONTGOMERY: Of course. Your Honor, you may  
15 recall that when we first appeared on this matter, we said  
16 the significance of it to us was that we wanted to make sure  
17 that our issues as retirees in the plan process were not  
18 unduly affected by what we thought was a false and  
19 inappropriate claim that might affect the voting in Class 14.  
20 That was the reason why we were joining the objection on  
21 behalf of the city. We continue to believe that that is a  
22 potentially material issue. We won't know if we were right  
23 or we were wrong until next Monday, but that is why this  
24 assertion of a \$26 million claim is potentially quite  
25 important to the way issues of both best interest and unfair

1 discrimination are fought.

2 THE COURT: Fair enough, but isn't it the fact that  
3 your briefs raise virtually identical issues?

4 MR. MONTGOMERY: Actually, if you will recall, your  
5 Honor, Macomb protested that we were being more aggressive on  
6 the res judicata issue than the city was. In fact, were I be  
7 arguing in front of you, I would be arguing the gates, not  
8 the evidence, that I believe block Macomb from being able to  
9 go forward, and so, your Honor, just in extreme summary form,  
10 we think that if you look at the transcript of the hearing  
11 before Judge Feikens in which the settlement was announced,  
12 it is perfectly clear from that settlement that the cost of  
13 repairs was part of the 2009 settlement; that both  
14 experienced counsel was there and experienced clients were  
15 there. It was not just an interest issue. It was a cost of  
16 repair issue. There's two settlement agreements and a  
17 determination by Judge Cleland that any damages that might  
18 arise out of these facts and circumstances were speculative,  
19 and we think that was concluded by -- or conclusively proven  
20 by the use of their expert witness, who didn't rely on his  
21 own work, who was forced to concede that he didn't know the  
22 competing facts and circumstances that might give rise to a  
23 different conclusion, and, therefore, your Honor, we think  
24 everything boils down to the narrow question, since the  
25 contracts block the basic claims, whether or not a fraud

1 claim can survive a governmental immunity assertion where the  
2 basic business that was being undertaken was one of operating  
3 a utility. It wasn't the commission of the fraud that was  
4 the business just like the Blackwell case, your Honor, you  
5 know. You can hire somebody. Whether you fail to disclose  
6 city finances in an improper manner, you're still barred by  
7 governmental immunity because the community was entitled to  
8 hire you as a governmental function. So, your Honor, in the  
9 shortest form, that is what I would have said in more words,  
10 and I think --

11 THE COURT: All right. Thank you.

12 MR. MONTGOMERY: Thank you.

13 MR. BRILLIANT: Your Honor, we just have a very  
14 short amount in rebuttal. Ms. Badalamenti will have some  
15 issues as well. I'm just going to tick off some things  
16 pretty quickly. I think generally, your Honor, the city's  
17 argument is just, you know, too cute by half, you know, all  
18 across the board starting with respect to the Marrocco, you  
19 know, testimony. As I said, you know, in our opening, your  
20 Honor should look at it. There's nothing inconsistent. With  
21 respect to the particular paragraph that -- you know, that  
22 counsel complains about, he's just basically taking it out  
23 of -- you know, out of context. You know, I suspect, your  
24 Honor, this is what happens when you do a declaration that's  
25 written by lawyers. All he says -- he's not saying that --

1 he's not saying that he reviewed the schedule that was  
2 created in 2010 with Mr. Mercado and that Mr. Mercado agreed  
3 to it. What he says is Mercado responded in the negative and  
4 represented on behalf of the city that the amounts that are  
5 in Exhibit 1 -- that the amount, the amount that they paid,  
6 you know, as being, you know -- you know -- you know, the  
7 amount for the costs were legitimately incurred and paid, so  
8 it's not that this somehow dates the -- you know, the -- you  
9 know, the conversation after the schedule was met. All he  
10 was saying was that that amount that showed up in --  
11 ultimately showed up in the schedule was represented by Mr.  
12 Mercado as being legitimate.

13 Your Honor, you know, the issue with respect to the  
14 letter of intent, you know, they say, you know, well, it  
15 wasn't binding on them. As your Honor points out, well, then  
16 what was the purpose for it? Of course they had this  
17 obligation during the diligence period to provide the  
18 information. They didn't. Even if, you know, their view is  
19 that they weren't required to do it, that just falls into a  
20 different category of -- you know, of fraud under Michigan  
21 law, and it just becomes silent fraud. When you know that  
22 the other party is interested in the information, that they  
23 view it as material, and you don't fully, you know, disclose  
24 it, you're still liable as if you, you know, made a  
25 fraudulent, you know, statement, so it doesn't really -- you

1 know, their difference is without, you know, any legal  
2 significance.

3           With respect to the diligence checklist that Mr.  
4 Hupp pointed out, they say that it's hearsay. It's not  
5 hearsay, Judge. We're not giving it to you for the proof of  
6 what's asserted as being true. We know it's not true.  
7 That's the point. We're giving it to you to show that they  
8 made a misrepresentation here, so it's not being offered for  
9 purposes of whether or not Mr. Jacobs and Mr. Walter were  
10 telling the truth when they said this. It's being offered  
11 for the fact that this is what they told us, that it's the  
12 representation, you know, that they made is clearly not  
13 hearsay and should be given the weight that it's entitled to.

14           As for the issue of Mr. Hupp saying that -- you  
15 know, that he wasn't aware at the time that they made  
16 representations that they made any wrongful representations,  
17 well, of course, that's right. If we would have known that  
18 they were misrepresenting the fact that there were, you know,  
19 overcharges or, you know, that there wasn't a governmental  
20 investigation, the deal wouldn't have closed. And the fact  
21 that he doesn't know today whether or not there were any  
22 misrepresentations is the fact that he's not the counsel  
23 that's involved in investigating and prosecuting, you know,  
24 these issues.

25           Now, your Honor, the best one is this issue about

1 the case that takes place next door in front of Judge  
2 Cleland. Now, counsel tells you, well, things have changed.  
3 Well, your Honor, I ask you to take judicial notice and go on  
4 the docket sheet, and what you're going to find out is that  
5 case is still ongoing. It hasn't ended. Certain parties  
6 have settled and given, you know, the city, you know, notes  
7 and -- you know, and money, which they're keeping even  
8 though, you know -- you know, basically double -- getting  
9 double paid, but more importantly, the case is ongoing. And  
10 has counsel filed an amended complaint to say they no longer  
11 believe these things or anything of that sort? No. He's  
12 still moving forward with the same pleadings, and he's making  
13 exact contradictory arguments to the arguments that he's  
14 making, you know, here today in front of your Honor.

15 Now, again, they say, well, you know -- you know, in  
16 order for it to be, you know, legally -- you can say whatever  
17 you want in one case and something different in another case,  
18 but that's not quite right, you know. Rule 11 applies.  
19 There's good faith obligations to the various courts. More  
20 importantly than that, judicial estoppel prohibits you from  
21 staying in one court and getting some kind of advantage.  
22 Here they filed a motion to intervene in the case based upon,  
23 you know, this complaint. They were successful in that.  
24 Maybe it creates judicial estoppel. Maybe it doesn't. But  
25 the point is, your Honor, because we're only at a summary

1 hearing here, it just shows that we have a likelihood of  
2 success here on this issue because they are in another court  
3 making representations to another court against other third  
4 parties. They're continuing to do it, and they're asserting  
5 the very opposite of what they're saying, you know, here  
6 today.

7 Your Honor, you know, I would just ask you to read  
8 these cases about the integration. I guess the one case I  
9 would say that may be of particular interest to you is the --  
10 I think it's pronounced Abbo case. I'm not going to waste a  
11 lot of your time here. I hope your Honor would read it.  
12 But, you know, what's interesting here, party says, "You want  
13 to buy this property? It's got five" -- you know, five -- I  
14 think it's five acres of lakefront property, sign a contract,  
15 contract doesn't, you know, require that it be, you know,  
16 lakefront property, sign the agreement, close the  
17 transaction. He then finds out that he doesn't have five  
18 acres of lakefront property. It was misrepresented to him.  
19 He sues for fraud. They say, "Whoa, you got a merger  
20 integration agreement," only representations contained in the  
21 agreement, didn't represent, you know, that it's got five  
22 pages -- five acres of lakefront property in the actual  
23 purchase agreement. Court below throws out the case, goes up  
24 to the Michigan appellate court. The Michigan appellate  
25 court says this is ridiculous. The person was given a

1 representation as to what he was -- what he was -- what he  
2 was buying. Turned out to be false. Therefore, it was  
3 fraudulent in the inducement. The merger clause does not,  
4 you know, bar him from bringing a claim even though that  
5 representation wasn't in the -- you know, wasn't in the case.  
6 This whole concept that they raise about, you know -- you  
7 know, reasonable notice makes no sense.

8                 The reason, your Honor, I started you in -- when I  
9 talked about their complaint with the issue of what it is  
10 that they were intervening on -- and I don't know if your  
11 Honor remembers, but it basically said that they were  
12 intervening on, you know, the sewer contract with respect to  
13 items two and three, amendments two and three, you know. And  
14 the reason I did that was because now they say, oh, you know,  
15 all the damage claims, all this other stuff, involved the  
16 other part of the contract. Well, that's just not right,  
17 your Honor. You know, the -- you know, the issue here is  
18 with respect to, you know, the alleged 23 million with  
19 respect to two and three.

20                 Your Honor, you know, they breached the contract.  
21 They acted in bad -- undoubtedly acted in bad faith. They  
22 knew about the investigation. They knew it was relevant to  
23 DWSD. They didn't disclose it. They contractually agreed to  
24 disclose these types of things. They misrepresented the fact  
25 that there weren't claims against subcontractors. Mr.

1 Marrocco's testimony is basically unrefuted. Nobody says  
2 that he didn't have this conversation, you know, with Mr.  
3 Mercado nor could they other than, you know, Mr. Mercado, who  
4 we would have had testify here today if he wasn't,  
5 unfortunately, you know, unavailable as he is no longer in  
6 prison, but he's in a halfway house and has, you know -- you  
7 know, left the state and we were not able to subpoena him.  
8 But the bottom line here is, your Honor, what the city, you  
9 know, did was wrong, you know. You know, the good news is,  
10 you know, the wrongdoers are gone, but, you know, their  
11 actions cost other parties significant amount of money which  
12 needs to be -- needs to be recouped and should be, you know,  
13 compensated. And what's really, in my mind, you know, most  
14 upsetting about this situation is although the wrongdoers,  
15 you know, seem to be gone, the people that are still there,  
16 you know, try to justify everything that happened and to  
17 pretend that, you know, what was done, you know, wasn't wrong  
18 and didn't take advantage of people in an unlawful, you know,  
19 and fraudulent manner. I think Ms. Badalamenti has a few  
20 quick comments, and then we'll be done, your Honor. No, your  
21 Honor. Actually, she says that we're done. We thank you --

22 THE COURT: Okay.

23 MR. BRILLIANT: -- your Honor, for, you know,  
24 your --

25 THE COURT: Right.

1           MR. BRILLIANT: -- diligence to this and --

2           MS. BADALAMENTI: Thank you, Judge.

3           THE COURT: Okay. My intent is to give you an  
4 estimate of the claim, little more, and to do that at  
5 Monday's status conference at ten o'clock. All right. So we  
6 will continue this matter until then.

7           MR. BRILLIANT: Thank you, your Honor.

8           (Proceedings concluded at 12:46 p.m.)

## INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

July 22, 2014

---

Lois Garrett